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IN THE

Supreme Court of the United States

DELBERT WILLIAMSON, ET AL.,

Petitioners,

v.

MAZDA MOTOR OF AMERICA, INC., ET AL.,

Respondents.

On Writ of Certiorari to the California Court of Appeal, Fourth Appellate District, Division Three

BRIEF OF *AMICUS CURIAE* PRODUCT LIABILITY ADVISORY COUNCIL, INC. IN SUPPORT OF RESPONDENT MAZDA MOTOR OF AMERICA

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BRIEF OF PRODUCT LIABILITY ADVISORY COUNCIL, INC. AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF THE *AMICUS CURIAE*

Product Liability Advisory Council, Inc. ("PLAC") is a non-profit association with 101 corporate members representing a broad cross-section of American and international product manufacturers. These companies seek to contribute to the improvement and reform of the law in the United States and elsewhere, with emphasis on the law governing the liability of manufacturers of products. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. Since 1983, PLAC has filed over 725 briefs as *amicus curiae* in both state and federal courts, including this Court, presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product liability. Appendix A lists PLAC's corporate members.

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

INTRODUCTION

Traditional preemption principles forbid a state jury from rewriting a federal motor vehicle safety standard. In this case, Petitioners' liability claim presents a direct, actual conflict with Federal Motor Vehicle Safety Standard 208 ("FMVSS 208") in effect when the Mazda made Petitioners' MPV Minivan in 1993. This case, therefore, is a text book example of conflict preemption: a state law cannot impose liability on conduct authorized by federal regulation. *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 37 (1996) (concluding that "ordinary legal principles of pre-emption" prevent a state law from prohibiting activity that federal law explicitly authorized).

In 1993 FVMSS 208 *required* automobile manufacturers to use one of two types of seatbelts for all rear, inboard seats: Type 1 (lap only) or Type 2 (lap/shoulder). Petitioners could not dispute that a state lawsuit or regulation would be preempted if it sought to declare both of FMVSS 208's options unsafe and defective.

The answer is no different when Petitioners seek to declare one of FMVSS's 208 permitted options unsafe. If FMVSS 208 were not given preemptive effect, there would be no backstop to prevent states, or different counties within the same state, from striking *both* options as "unsafe." The next lawsuit could just as easily target Type 2 seatbelts as unsafe for that particular plaintiff and accident.

This case is more rudimentary than *Geier v. American Honda Motor Co., Inc.*, 529 U.S. 861 (2000). In *Geier*, the Court held that a general federal safety policy permitting, but not requiring, the use of

airbags preempted a state common-law tort claim — even though the state tort law claim did not directly conflict with the federal regulation. Here, the federal government's regulation mandated compliance with one of two seatbelt options; there is a direct conflict if the state were to declare one of those seatbelts unsafe.

Not only does Petitioners' claim directly conflict with FMVSS 208, but allowing Petitioners' claim to continue would undermine several policies underlying both the National Traffic and Motor Safety Act ("Safety Act"), which authorized the National Highway Traffic Safety Administration ("NHTSA") to promulgate automotive safety standards, and FMVSS 208. Congress made NHTSA the expert to improve vehicle safety by balancing safety, cost, consumer acceptance, and technological feasibility. There was no perfect answer as of 1993—nor is there now[2]—for the type of seatbelt to use for rear, inboard, aisle seats of minivans. Consequently, NHTSA's expert judgment, much like with the introduction of passive restraints, was to authorize specific options. It was a deliberate policy decision.

Preemption recognizes Congress's decision to let NHTSA decide. A lay jury may not usurp the policy decisions made by federal experts to set the appropriate types of seatbelts for rear, inboard, aisle

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[2] In fact, NHTSA is still, even today, evaluating what the best seatbelt options are for children in passenger vehicles. *See* 75 Fed. Reg. 53734 (Sept. 1, 2010) (explaining that NHTSA is collecting data on child restraint devices, including seatbelt fit, to ensure that optimal child safety is reached). In short, despite all of the additional research that has been conducted since 1989, NHTSA has still not determined what seatbelt options best protect children.

seats, considering all types of passengers, vehicles, and accident scenarios. The Safety Act reflects Congress's goal of national uniformity of federal standards when NHTSA has acted.

Finally, manufacturers have a right to rely on FMVSS 208 when designing a vehicle. Petitioners' claim, if allowed, threatens to impose repeated, retroactive tort liability upon manufacturers for using a type of seatbelt specifically authorized by the federal government.

In short, Petitioners' claim is preempted on two grounds: their claim directly conflicts with FMVSS 208, and their claim would significantly frustrate the policies underlying the Safety Act and FMVSS 208.

BACKGROUND

Petitioners' claim arises from a highly unusual accident. Delbert Williamson was driving a 1993 Mazda MPV Minivan in which Mr. Williamson's wife Thanh and seven-year-old daughter Alexa were passengers. Pet. Br. 16-17. A motor home, traveling in the opposite direction, was towing a Jeep Wrangler. The Jeep came loose and struck the Williamsons' van. *Id.* at 17. The collision caused fatal internal injuries to Mrs. Williamson from the lap belt. *Id.* For unknown reasons, Mrs. Williamson sat in the rear, inboard, aisle seat wearing a Type 1 belt. Alexa was sitting in the rear outboard seat wearing a Type 2 lap-shoulder belt. The van had three other seats with Type 2 belts.

Petitioners' claim that Mazda's minivan was unsafe and defectively designed because Mazda chose to install a Type 1 rather than a Type 2 seatbelt in the rear, inboard, aisle seat. There is no dispute that

FMVSS 208 as of 1993 authorized Mazda to use a Type 1 belt for that seating position.

Both the California Superior Court and the California Court of Appeal determined that "FMVSS 208 preempts common law actions alleging a manufacturer chose the wrong seatbelt option." Resp. Br. 15 (quoting opinion of California Court of Appeal). Therefore, the Court of Appeal affirmed the dismissal of Petitioners' Complaint.

Congress enacted the Safety Act in 1966 to protect the public "against unreasonable risk of accidents occurring as a result of the design, construction or performance of motor vehicles, and . . . against unreasonable risk of death or injury in [an accident.]" 15 U.S.C. § 1391(1). Congress intended the safety standards promulgated under the Safety Act to be "uniform national standards." *Wood v. General Motors Corp.*, 865 F.2d 395, 412 (1st Cir. 1988). The Senate Report on the Act emphasized that "[t]he centralized, mass production, high volume character of the motor vehicle manufacturing industry in the United States requires that motor vehicle safety standards be not only strong and adequately enforced, but that they be uniform throughout the country." S. Rep. No. 89-1301, at 12 (1966). Otherwise, as President Johnson noted: "The only alternative is unthinkable – 50 standards for 50 different States. I believe that this would be chaotic." 112 Cong. Rec. 14,253 (1966).

The Safety Act directs the Secretary of Transportation to establish federal motor vehicle safety standards which "shall be practicable, [and] meet the need for motor vehicle safety." 49 U.S.C. § 30111(a). This duty is in turn delegated to NHTSA.

The "practicability" requirement compels NHTSA to consider factors "including technological ability to achieve the goal of a particular standard as well as . . . economic factors." H.R. Rep. No. 89-1776, at 16 (1966). Thus, safety, technological feasibility, consumer acceptance, and economic factors are important in the development of NHTSA policy and FMVSS regulations. *See Geier*, 529 U.S. at 878-79.

FMVSS 208 is a comprehensive regulation detailing requirements for occupant crash protection. The purpose of FMVSS 208 is vehicle safety: "to reduce the number of deaths of vehicle occupants . . . by *specifying equipment requirements* for active and passive systems." 49 C.F.R. § 571.208, S2 (emphasis added). The Safety Act and FMVSS recognize the necessity for tradeoffs, and for NHTSA to make those complex engineering and policy determinations. It has the expertise, experience, and political authority to make those Solomonic decisions.

Under the version of FMVSS 208 in effect in 1993, both Type 1 (lap) and Type 2 (lap/shoulder) were approved seatbelts for rear, inboard seats. 49 C.F.R. § 571.208, S4.1.4. NHTSA believed that Type 1 belts would improve child safety in the rear, inboard, aisle seat and also not block access to the third row seats. It concluded that children would often sit in the rear, inboard, aisle seat, that a lap belt would work more effectively with child restraint systems, and that a lap/shoulder belt presented safety dangers to smaller children. NHTSA's determination represented its best judgment, balancing considerations of safety for every size, gender, and age of passenger, as well as likely accident conditions, technical feasibility at the time, cost, consumer acceptance, and need for more

field data comparing the relative efficacy of the two alternatives.

NHTSA's deliberate decision to provide two options for rear, inboard seating resulted from at least two decades of rulemaking experience. In 1967, FMVSS 208 required manufacturers to install Type 2 seatbelts in front outboard seats, but provided manufacturers with the option to install either Type 1 or Type 2 seatbelts in other seats. 32 Fed. Reg. 2408, 2415 (Feb. 3, 1967). Although no official explanation of this policy decision was released then, the decision not to require Type 2 seatbelts in every seating position centered around safety, consumer use, and technology concerns. First, child seats of the time were more compatible with Type 1 belts. 35 Fed. Reg. 14941, 14942 (Sept. 25, 1970); *see also* 49 Fed. Reg. 15241, 15241 (Apr. 18, 1984) (explaining that "most child restraints are designed to be used with only lap belts"). Second, the public saw Type 2 belts as uncomfortable and ill fitting. 41 Fed. Reg. 54961, 54962 (Dec. 16, 1976) (explaining that shoulder belts were a chief source of complaints, "contribut[ing] substantially to the public's complaints of lack of comfort and fit"). Consequently, they were not used as often as Type 1 belts. *See* 44 Fed. Reg. 77210, 77212 (Dec. 31, 1979) (explaining that only 7% of women were more likely to wear a lap-shoulder belt because of the "existence of greater problems of chest fit and pressure for women); 52 Fed. Reg. 22818, 22819 (Jun. 16, 1987) (noting that front seat belt use was five times rear seat usage in 1981-1982).

In the 1980s, NHTSA again considered the issue of requiring Type 2 seatbelts in all rear seats, but

rejected this proposal largely because of concern for child safety with Type 2 belts. 49 Fed. Reg. 15241, 15242 (Apr. 18, 1984). In 1987, NHTSA once more re-examined whether Type 2 belts should be required for all rear seating. 54 Fed. Reg. 46257, 46258 (Nov. 2, 1989).

Ultimately, as of 1993, NHTSA had determined that it would require manufacturers to place Type 2 belts in all rear, outboard seats, but not rear, inboard seats. It rejected a rule requiring Type 2 belts in all rear seats. Why? To gain more consumer use of seatbelts, to protect children better, to allow technology to improve and cost to decline, and to obtain more real-world data—all reasons authorized by Congress in the Safety Act, and reasons fit for an expert agency to weigh and balance from a national perspective.

NHTSA's decision to allow Type 1 or Type 2 seatbelts in rear, inboard seats reflects the fact that neither type provides the maximum degree of safety in all situations for all individuals. There were safety trade-offs for both options. As discussed in detail in Respondent's Brief (Resp. Br. at 6-14, 31-38), NHTSA was concerned with three areas: (1) child safety, (2) aisle seat safety, and (3) technical challenges and costs. Notably, NHTSA expected no deaths to result from the use of Type 1 belts for rear, inboard seats. 54 Fed. Reg. 25275 (June 14, 1989) ("A number of studies . . . have evaluated thousands of cases and repeatedly concluded that lap-only belts are, in fact, substantially effective in preventing deaths and reducing injuries.")

In the end, NHTSA concluded that "there would be small safety benefits and substantially greater costs"

to require Type 2 belts for rear, inboard seats. 53 Fed. Reg. 47982, 47984-85 (Nov. 29, 1988). Moreover, as NHTSA explained: "Requiring significant industry and agency resources to be spent for relatively little safety gain *can result in a lost opportunity to better improve vehicle safety through other means*, such as improved frontal or side impact protection." 52 Fed. Reg. 22818, 22819 (June 16, 1987) (emphasis added).

ARGUMENT

As Article VI of the United States Constitution provides, the laws of the United States "shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any state to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. Consistent with that constitutional command, this Court has long recognized that state laws that conflict with federal law are "without effect." *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981).

This case presents a question of implied conflict preemption under the Supremacy Clause. Implied conflict preemption looks for an actual conflict between federal law and state law. *See Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300 (1988). An actual conflict exists when a state law frustrates federal regulation and "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Fidelity Fed. Savings & Loan Assoc. v. de la Cuesta*, 458 U.S. 141, 153 (1982) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

Petitioners' claim is impliedly preempted because their claim directly conflicts with FMVSS 208. Petitioners' claim is also preempted because it would significantly frustrate the policies underlying the Safety Act and FMVSS 208.[3]

I. PETITIONERS' STATE LAW TORT CLAM DIRECTLY CONFLICTS WITH FMVSS 208.

Through FMVSS 208, NHTSA had authorized a manufacturer in 1993 to choose one of two specified options when selecting a seatbelt for rear, inboard seats. *See* 49 C.F.R. § 571.208. A manufacturer could not choose to use another type of seatbelt or active restraint system not articulated in the regulation for use in rear, inboard seats without violating federal law. *See* 49 C.F.R. § 571.208. As a result, the plain language of FMVSS 208 authorized manufacturers to use Type 1 belts in rear, inboard seats of automobiles. *Id.* (providing that manufacturers must choose between Type 1 or Type 2 belts for this seating position).

Allowing a state to impose liability on a manufacturer for the use of a Type 1 seatbelt would directly conflict with FMVSS 208 and thus is preempted. *See Barnett Bank of Marion County v. Nelson*, 517 U.S. 25, 31 (1996) (noting that a direct conflict exists where federal law authorizes activity that state law "expressly forbids"); *de la Cuesta*, 458 U.S. at 156 (holding that state law may not forbid the

[3] Petitioners attempt to rely on a presumption against preemption to jump to a conclusion without any rigorous analysis of whether their position is correct. As a result, their reliance on a presumption amounts to nothing more than a post hoc rationalization to avoid the weighty legal and policy arguments that Petitioners cannot overcome.

use of a contract term expressly authorized by a federal regulation); *Chicago & North Western Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 318 (1981) ("'It would be inconsistent with [federal] policy . . . if local authorities retained the power to decide' whether the carriers could do what [federal law] authorized them to do.") (quoting *City of Chicago v. Atchison, T. & S.F.R. Co.*, 357 U.S. 77, 87 (1958)).

The fact that NHTSA has authorized a manufacturer to choose among two types of seatbelts to comply with a regulation does not mean that a state may preclude the manufacturer from choosing one of those options. *See Hurley v. Motor Coach Indus., Inc.*, 222 F.3d 377, 383 (7th Cir. 2000); *see also Irving v. Mazda Motor Corp.*, 136 F.3d 764, 769 (11th Cir. 1998) ("Because Plaintiff sued Defendants for exercising an option explicitly permitted by Congress, a conflict exists between state and federal law if Plaintiff goes forward with this state law claim of defective design."). Congress empowered NHTSA to make that safety decision; a state jury may not second-guess NHTSA's decision to permit an option.

If states were permitted to eliminate through common law liability one option that federal law expressly sanctions, nothing would prevent states from eliminating the other option as well, or even requiring a more aggressive belt restraint system. Congress, through NHTSA, did not intend to permit states to pick and choose which federally authorized option would be amenable to each individual state or any particular jury within a state. Such a result would not only destroy any semblance of uniformity, but would subject automobile manufacturers to

different design standards in each state or potentially multiple standards within the same state.[4]

For example, under the regime that Petitioners advocate, a jury in California might decide that a Type 2 belt is necessary to meet a common-law duty of care; meanwhile, a jury in Ohio might decide in another accident that a Type 2 belt is dangerous and defective. Jury by jury, each FMVSS option could be eliminated. Juries look microscopically at one accident, one plaintiff, and one set of injuries.

However, to improve safety nationally, Congress directed NHTSA in setting FMVSS to consider all sizes, ages, genders, and conditions of passengers, all conceivable accident scenarios, and the probability, extent, and nature of all possible injuries. NHTSA has the engineering expertise, national field and test data, and macro overview that a single jury does not have. To make safety work, NHTSA must also assess consumer acceptance, feasibility, and cost—again from the viewpoint of the national good. NHTSA

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[4] This practical result is one reason that Petitioners are wrong to argue that tort liability would supplement FMVSS 208. The Supreme Court has recognized the intersection of preemption and the federal government's commerce power, stating that it is "not always a sufficient answer to a claim of pre-emption to say that state rules supplement, or even mirror, federal requirements." *United States v. Locke*, 529 U.S. 89, 115 (2000). The goal of uniformity, while not dispositive, must be considered when deciding whether concurrent regulation is appropriate. *Id.* As Justice Holmes stated: "When Congress has taken the particular subject-matter in hand, coincidence is as ineffective as opposition, and a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go." *Charleston & Western Carolina Railway Co. v. Varnville Furniture Co.*, 237 U.S. 597, 604 (1915).

must make a judgment for the greater good, recognizing the safety benefits and risks for each option. Recognizing those tradeoffs, it allowed a choice to manufacturers and consumers in FMVSS 208.

NHTSA's determination to authorize seatbelt options for rear, inboard seats is explicit federal law and a deliberate policy decision. That someone might be harmed by it is an unfortunate but inevitable consequence of the power that Congress invested in NHTSA. In fact, phasing in airbags likely cost some lives, but saved others. So, too, the current mandate for airbags kills or injures some, while saving others from harm.[5] Because imposing tort liability on Mazda arising from its exercise of a federally-authorized choice conflicts with FMVSS 208, Petitioners' claim is preempted.

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[5] Despite the fact the airbags are now viewed as important for safety, several lawsuits have been, and continue to be, initiated claiming that airbags are unsafe. *See generally Gaudio v. Ford Motor Co.*, 976 A.2d 524, 531 (Pa. 2009) (administrator of a deceased motorist's estate claims that air bag deployed at too low of a speed, or too late, and that if air bag would not have deployed at all, the deceased would have suffered only minor injuries); *Platow v. Ford Motor Corp.*, No. ESX-L-1288-99, 2005 WL 3663928, at * 1 (N.J. Super. Ct. App. Div. Jan. 17, 2006) (driver claiming that his quadriplegia resulted from the driver's violent contact with the deploying air bag); *Alves v. Mazda Motor of Am., Inc.*, 448 F. Supp. 2d 285, 288 (D. Mass. 2006) (driver alleges that air bag deployed in low-speed crash and hit her in the eyes, causing her to become blind); *Fisher v. Ford Motor Co.*, 224 F.3d 570, 572 (6th Cir. 2000) (force of the deploying air bag from the steering column into the driver's face slammed her head back against the seat, causing injuries to her head).

This appeal presents a stronger case of implied conflict preemption than *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000), because *Geier* did not involve a direct conflict. At issue in *Geier* was FVMSS 208's passive restraint program. *Id.* at 879. The regulation required manufacturers to install some type of passive restraint, such as airbags or automatic seatbelts, in at least 10% of its cars by model year 1987. 49 C.F.R 571.208.S4.1.3.1. The rule did not require auto manufacturers to install any particular type of restraint and did not limit manufacturers' choices. *See id.* Manufacturers could install automatic seatbelts, airbags, or any other suitable passive restraint technology so long as it met the minimum performance standards. *See id.*

In *Geier*, nevertheless, the Court held that FVMSS 208 preempted state tort lawsuits that would frustrate the objectives of the federal passive restraint regulation. The Court noted that the Secretary of Transportation had rejected an all-airbag standard in favor of a more gradual phase-in of passive restraints. *Id.* at 879. The objective of FVMSS 208 was to provide manufacturers "a range of choices among different passive restraint devices" so as to "bring about a mix of different devices introduced gradually over time." *Id.* at 875. In that way, the federal government best believed that it could maximize safety. The Court thus held that FVMSS 208 preempted a state tort lawsuit claiming that Honda should have installed an airbag in plaintiff's car. The Court held that, "by its terms [such a lawsuit] would have required manufacturers of all similar cars to install airbags rather than other passive restraint systems . . . [and] thereby would

have presented an obstacle to the variety and mix of devices that the federal regulation sought." *Id.* at 881.

In Petitioners' attempt to strike against preemption when an FMVSS allows options, Petitioners fundamentally misconstrue *Geier*. The plaintiff in *Geier* did not challenge the effectiveness of *another* approved passive restraint system. In fact, as the Court states, *the car in* Geier *was not equipped with any passive restraint system.* *Id.* at 865. Thus, the *Geier* plaintiff's lawsuit did not seek to have one option declared unsafe in favor of another. There was no direct conflict with the language of the regulation, and the Court could not have relied solely on the fact that Honda had installed a permitted option.[6] The conflict in *Geier* instead came from the frustration of the purpose of FMVSS 208.

To be sure, had the plaintiff sought to declare automatic seatbelts unsafe, even the dissenting justices in *Geier* likely would have concluded that the lawsuit was preempted. The dissent explains that, in its view, preemption would be required "of course, if Petitioners had brought common-law tort claims challenging Honda's compliance with a mandatory minimum standard -- *e.g.*, claims that a 1999 Honda was negligently and defectively designed *because* it was equipped with airbags as required by the current

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[6] Likewise, in *Wyeth v. Levine*, the plaintiff did not attempt to remove, through tort liabilkity, an approved method for administering the drug. *See Wyeth v. Levine*, 129 S. Ct. 1187, 1194 (1009).

version of Standard 208." *Id.* at 893 n.6 (Stevens, J., dissenting).

Honda's preemption argument prevailed in *Geier,* even though there was no direct conflict. The argument against Petitioners' case here is much easier. Here, because there is a direct conflict between the regulation's requirements and state tort law, the state tort suit is preempted. No further analysis is needed.[7]

II. PETITIONERS' COMMON LAW CLAIM FRUSTRATES NHTSA'S POLICY DECISIONS MADE IN FMVSS 208.

When a state tort lawsuit would interfere with a federal objective, the lawsuit is preempted.[8] *Geier,* 529 U.S. at 881. Petitioners cannot evade preemption by asserting that FMVSS 208 is a minimum safety standard. It is not. FMVSS 208 is a regulation with explicit, limited options for seatbelts. Accordingly, Petitioners' lawsuit, if permitted, would

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[7] In their brief, Petitioners assert that NHTSA encouraged manufacturers to install Type 2 belts in rear inboard seats. *See generally* Pet. Br. 11. Although that statement is part of the legislative history, it is not found in the actual language of FMVSS 208, which specifies the two options with no further limiting language. The passive retraint rule in *Geier* also encouraged the use of passive restraints, but that encouragement did not preclude preemption.

[8] There can be no dispute here that the preemptive effect of FMVSS 208, like a product defect, must be judged by the rule in effect when the product was made, not based upon later changes in the law and technology. The fact that this regulation was changed 11 years after Petitioner's vehicle was manufactured and 15 years after this portion of FMVSS 208 was enacted has no bearing on the Court's analysis.

frustrate federal policy as set in NHTSA's safety standard.

A. Following *Geier*, NHTSA's policy decisions embodied in FMVSS 208 impliedly preempt Petitioners' claim.

The Court in *Geier* determined that plaintiff's state common-law tort claims conflicted with FMVSS 208's passive restraint policy. It analyzed NHTSA's cost, safety, and technological policy decisions supporting the adoption of FMVSS 208's passive restraint regulation. 529 U.S. at 875-79. The Court examined the safety concerns, noting that NHTSA had rejected an all-airbag standard due to "safety concerns (perceived or real) associated with airbags." *Id.* at 879 (citing 49 Fed. Reg. 28990, 29001 (1984)). The Court also considered the fact that NHTSA had authorized manufacturers to choose among different technologies that would allow for the development of comparative performance data and would facilitate development of alternative, cheaper, and safer technologies. *Id.* (citing 49 Fed. Reg. 28990, 29001-02 (1984)). Finally, the Court observed that the asserted common-law duty to provide airbags would present an obstacle to the mix of technologies and manufacturer choice intended by the federal safety standard. *Id.* at 881. Ultimately, because the state tort law claim would interfere with, and obstruct the accomplishment and execution of, the important federal objectives embodied in FMVSS 208's passive restraint policy, the plaintiff's claim was held to be preempted. *See id.*

Geier establishes that a federal regulation based on an agency's balancing of safety, costs, consumer acceptance, and technological concerns is a legitimate

federal objective deserving preemptive effect. This principle is hardly novel; even the states have regularly accepted it. *See, eg.*, Priester v. Cromer, --- S.E.2d ---, 2010 WL 2990978 (S.C. Aug. 2, 2010) (concluding that plaintiff's state tort law claim, that her truck was defectively designed because the manufacturer selected one of the federally authorized choices for glass outlined in FMVSS 205, was preempted and thus reasoning that such a result would stand as an obstacle to achieving the purposes and objectives of FMVSS 205); *Morgan v. Ford Motor Co.*, 224 W.Va. 62, 79 (W. Va. 2009) (concluding that plaintiff's state tort law claims were preempted because "FMVSS 205 permits the manufacturer to make a choice between available safety options for side-window glass; a design defect claim would foreclose choosing one of those options"); *Frith v. BIC Corp.*, 863 So. 2d 960, 967 ¶17 (Miss. 2004) (en banc) (concluding that plaintiff's claim failed as a matter of law because its effect was to punish the manufacturer for selling a certain product — a lighter that a ten-year-old could operate — when the federal government had determined such product was safe enough and should continue on the market)

In FMVSS 208, NHTSA created a comprehensive regulatory system for occupant protection. Petitioners' attempt to narrow the focus to a small portion of this regulation to establish that these two options have limited meaning is disingenuous. Through FMVSS 208, NHTSA has exercised its best judgment, based on decades of rulemaking experience and real world, national data, to achieve the proper balance between considerations of safety, cost, effectiveness, and personal convenience in all types of

occupant restraint systems. The decision to require Type 1 or Type 2 belts in rear, inboard seats is one of those decisions that NHTSA made to ensure that occupant protection as a whole is maximized. One unusual, tragic accident is no reason to allow juries to interrupt and disrupt NHTSA's policy decisions and to create chaotic uncertainty in federal preemption law.

FMVSS 208's active restraint policies, like its passive restraint policies, were developed because of NHTSA's balancing of safety, costs, consumer use, and technological feasibility. In its continual re-evaluation of FMVSS 208, NHTSA examined decades of research investigating appropriate seatbelts for rear, inboard seats. NHTSA's decision to allow Type 1 or Type 2 seatbelts in rear, inboard seats reflects the fact that neither type provides the maximum degree of safety in all situations for all individuals. There were acknowledged safety trade-offs for both options.

First, with regard to safety concerns, NHTSA recognized that Type 2 belts may have safety benefits for some adults, but would have serious safety drawbacks for younger, smaller children – the most common occupant of rear, inboard seats. NHTSA concluded that "[m]any of these children are not yet big enough to use the shoulder belt, . . . since it could pass over their neck or face." 53 Fed. Reg. 47988, 47989 (Nov. 29, 1988). As a result, NHTSA recommended then that younger children not use the shoulder belt and instead only use the lap belt. *Id.*

Moreover, most child restraints in the late 1980s and early 1990s were compatible with lap belts and

could only be used with lap/shoulder belts with difficulty. *See* NHTSA, Child Passenger Safety Resource Manual 88 (March 1992) (stating that the "center rear seating position," which almost always has a lap belt, "often has a belt that is tightened by hand and therefore usually poses fewer compatibility problems [for child restraints]"); 56 Fed. Reg. 3064, 3064 (Jan. 28, 1991) ("[E]ven as more rear outboard seats of vehicles on the road have shoulder restraints, the safest position for the child restraint (the center rear position) *will not be equipped with shoulder restraints.*") (emphasis added); Comments of MercedesBenz of North America, Inc., docketed as NHTSA 87-08-NOI-021 (July 30, 1987) ("Due to the extremely low occupancy-rate of the rear center seat by adults, plus an improved suitability for fastening child restraint systems, the rear-center seats are equipped with lap belts.").

In sum, Type 2 belts presented NHTSA with a serious safety concern for children that could not be lightly brushed aside. The federal decision to authorize Type 1 belts in rear, inboard seats recognizes the trade-off of risk and the need for more real-world and test data before conclusively requiring only one option.

NHTSA is charged with promulgating nationwide standards that "protect against unreasonable risk of death or injury" in all accident patterns. *See* 15 U.S.C. § 1391(1). With that broader perspective mandated by the Safety Act, NHTSA retained a safety standard that carefully balanced the competing public interests of individuals like Mrs. Williamson with young children who may have been injured or disabled had Type 2 belts been the only

choice. A single jury, which naturally will feel sympathy to the plaintiff before it and dwell on the particular circumstances of the plaintiff's accident, should not be allowed — and under the Supremacy Clause is not allowed — to undo a federal agency's expert decision made in the wider public interest.[9]

Furthermore, because of the option presented in FMVSS 208, consumers have the choice to purchase a vehicle with the type of safety options best suited for them. As one judge aptly explained: "In today's market, the consumer is, in the sense of safety options, a designer. The consumer who wishes protection beyond that required by federal law can obtain that protection for a cost. Other safety options, such as side air bags, roll bars, steel cages, and even bullet proof windows, are available and can be incorporated if the consumer is willing to pay a higher price." *Celucci v. Gen. Motor Corp.*, 676 A. 2d 253, 263 (Pa. Super. Ct. 1996) (Cirillo, J. concurring). Put simply, if Petitioners wanted a car with a Type 2

[9] Additionally, a state tort law is "pre-empted if it interferes with the methods by which the federal statute was designed to reach this goal." *See Intern'l Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987) (concluding that a Vermont law would allow respondents to circumvent the NPDES permit system, thereby upsetting the balance of public and private interests so carefully addressed by the Act). Allowing a jury to eliminate one of the options carefully chosen by NHTSA would undermine the methodology that NHTSA utilizes to meet the goals dictated in the Safety Act. In its efforts to optimize national vehicle safety concerns, NHTSA makes deliberate decisions to include options when no one device consistently eliminates injuries and deaths. NHTSA relies upon further technological development, testing, and real-world field data before eliminating or adding any option. A finding that preemption does not apply here would upset NHTSA's methodology for determining which options are best suited for consumers.

belt in the rear, inboard, aisle seat, they could have purchased one. Moreover, Mrs. Williamson, within her own vehicle, had the opportunity to choose to sit in a seat with a Type 2 belt.

Second, the Court in *Geier* validated NHTSA's policy concern for the expense that manufacturers would face in requiring all cars to have airbags. Here, too, NHTSA was concerned with cost to manufacturers, and ultimately consumers. NHTSA estimated that requiring Type 2 belts in rear center seats would cost $109 million in passenger cars and $42 million in minivans and light trucks with little safety gain.

Third, in *Geier*, the Court upheld NHTSA's policy decision to allow the mix of technologies and manufacturer choice because it encouraged manufacturers to develop new and better technologies for safety. Here, too, NHTSA was concerned with encouraging manufacturers to develop new technologies for safety.

NHTSA found that the use of Type 2 belts in inboard, aisle seats created "potential ingress/egress problems . . . for those more rearward seats" because of anchoring of the shoulder strap. 69 Fed. Reg. 70904 (Dec. 8, 2004); *see also* 55 Fed. Reg. 30914, 30915 (July 30, 1990). These technical concerns were not easily solved and in fact took over a decade for manufacturers to develop an appropriate solution. 69 Fed. Reg. at 70909 (explaining that in 2004 NHTSA had allowed manufacturers to install detachable lap/shoulder belts for inboard aisle seats).

Moreover, NHTSA recognized that Type 2 belts in rear, inboard seats would force manufacturers to compromise other safety. For example, the structural changes required for Type 2 belts in these positions would result in "disruptions of the vehicle's cargo carrying area or impede the driver's rearward vision." 53 Fed. Reg. at 47984. By providing manufacturers with an option, NHTSA allowed additional time for manufacturers to design a Type 2 belt for rear, inboard seats that was not only safer, but more technically feasible, more comfortable, and less expensive to consumers.

In short, similar to FMVSS 208's passive restraint regulation, FMVSS 208's active restraint regulation was developed due to NHTSA's deliberate and careful balance of safety, costs, consumer acceptance, and technological feasibility. It would be an odd result for this Court to sustain the preemptive effect of FMVSS 208 in the context of passive restraints, but deny preemptive effect to NHTSA's equally, carefully considered rule for active, rear seat restraints in FMVSS 208. The preemptive effect of each provision of FMVSS 208 would be thrown into a quandary.[10] To uphold NHTSA's policy determination as well as the superior constitutional force of federal law, this Court should hold that FMVSS 208's active restraint regulation preempts Petitioners' state law claim that would conflict with NHTSA's policy objectives.

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[10] For example, would an accident victim injured by a lap/shoulder belt in a rear, outboard seat be allowed to prosecute a state law claim? Or insist that an airbag should have been installed? Or a five-point belt? The preemptive effect of FMVSS 208 and other federal regulations would be parsed line by line, injecting unwarranted uncertainty into the force of, and the ability to rely on, federal law.

B. FMVSS 208 is not a minimum safety standard.

Throughout their brief, Petitioners assert that all FMVSSs are generally defined as "minimum safety standards." As a result, Petitioners contend that these regulations have no preemptive effect. Pet. Br. 27-28. This is not the case. As *Geier* made clear, FMVSSs that grant explicit options to manufacturers to implement federal policy are not minimum safety standards. 529 U.S. at 874-75.

The fact that FMVSS 208 required auto manufacturers to use one of two seatbelt types distinguishes it from a material or minimum safety standard. FMVSS 208 is a safety standard by its very terms: it embodies a policy judgment. If NHTSA did not care to mandate an option, it could easily have said merely that all rear seats must have a passenger restraint. Instead, NHTSA specified the particular restraint design options after careful consideration. In contrast, minimum safety standards create a regulatory floor that a manufacturer must meet. In accordance with such a standard, states have room to mandate more strenuous regulations than the minimum contained within the federal standard but cannot regulate in a manner that conflicts with that federal standard.

For example, *Geier* distinguished FMVSS 105, 49 C.F.R. 571.105, which establishes minimum standards for brake performance and the installation of airbrakes. A lawsuit contending that a car should have included anti-lock brakes, though it would go beyond this minimum standard, would not create a conflict with the federal regulation. Another example of a minimum safety standard is FMVSS 108, 49

C.F.R. § 571.108, which establishes a minimum candlelight standard for vehicle lighting equipment. *See Harris v. Great Dane Trailers, Inc.*, 234 F.3d 398, 399 (8th Cir. 2000); *Buzzard v. Roadrunner Trucking, Inc.*, 966 F.2d 777, 778 (3d Cir. 1992).

But these regulations differ from the explicit options presented in FMVSS 208. It is rare, within the FMVSS, for NHTSA to provide explicit options for vehicle safety equipment. These rare and specific requirements for options reflect a deliberate policy judgment by NHTSA following its balancing of important safety and technological trade-offs. Petitioners' claim seeking to declare Mazda's authorized choice of seatbelt tortious is not creating a more strenuous regulation, but a contrary regulation. Therefore, their claim is preempted.

If Petitioners' assertion were adopted, there would be no further point in providing manufacturers with deliberate, well-researched, and explicit options. State tort law would still hold a manufacturer liable because the federally-authorized option chosen was not the safest restraint available for a plaintiff in that given situation. NHTSA's policy decisions would be for not. However, in the context of FMVSS 208, Congress established NHTSA, not a state jury, as the safeguard- the guardian—over manufacturer design decisions.

A litany of federal and state appellate courts have recognized the preemptive effect of NHTSA's policy-based options in FMVSS 208 and other federal motor vehicle safety standards. *See Carden v. Gen. Motors Corp.*, 509 F.3d 227, 232-33 (5th Cir. 2007); *Griffith v. Gen. Motors Corp.*, 303 F.3d 1276, 1282 (11th Cir. 2002); *Moser v. Ford Motor Co.*, 28 Fed. Appx. 168,

171 (4th Cir. 2001); *James v. Mazda Motor Corp.*, 222 F.3d 1323, 1327 (11th Cir. 2000); *Hurley*, 222 F.3d at 383; *Fisher v. Ford Motor Co.*, 224 F.3d 570, 574 (6th Cir. 2000).[11]

In sum, when a FMVSS contains explicit and deliberate options from which a manufacturer must choose, then that standard is not a minimum safety standard.

C. Petitioners' claim undermines the broad policy decisions behind the Safety Act.

Petitioners fail to recognize the thoroughly analyzed, judicious policy decisions underlying not only FMVSS 208, but the entire Safety Act. The application of a common-law standard that conflicts with FMVSS 208 would destroy the national uniformity of federal standards desired by the Safety Act. *See* H.R. Rep. No. 89-1776, at 17 (1966) ("[T]his

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[11] *See also Ellison v. Ford Motor Co.*, 650 F. Supp. 2d 1298, 1306 (N.D. Ga. 2009); *Anthony ex rel. Lewis v. Abbott*, 289 F. Supp. 2d 667, 669 (D.V.I. 2003); *Stewart v. Gen. Motors Corp.*, 222 F. Supp. 2d 845, 849 (W.D. Ky. 2002); *Carrasquilla v. Mazda Motor Corp.*, 166 F. Supp. 2d 169, 177 (M.D. Pa. 2001); *Davis v. Nissan Motor Corp. in U.S.A.*, No. 99 C 1186, 2000 U.S. Dist. LEXIS 7851, at *5 (N.D. Ill. June 2, 2000); *Doomes v. Best Transit Corp.*, 890 N.Y.S.2d 526, 527 (N.Y. App. Div. 2009); *Parks v. Hyundai Motor Am., Inc.*, 668 S.E.2d 554, 557 (Ga. Ct. App. 2008); *Roland v. Gen. Motors Corp.*, 881 N.E.2d 722, 729 (Ind. Ct. App. 2008); *Osman v. Ford Motor Co.*, 833 N.E.2d 1011, 1021 (Ill. App. Ct. 2005); *Heinricher v. Volvo Car Corp.*, 809 N.E.2d 1094, 1098 (Mass. App. Ct. 2004); *Hernandez-Gomez v. Volkswagen of Am., Inc.*, 32 P.3d 424, 427-28 (Ariz. Ct. App. 2001). *But see O'Hara v. Gen. Motors Corp.*, 508 F.3d 753, 764 (5th Cir. 2007); *Durham v. County of Maui*, 696 F. Supp. 2d 1150, 1151 (D. Haw. 2010); *Soto v. Tu Phuoc Nguyen*, 634 F. Supp. 2d 1096, 1102-03 (E.D. Cal. 2009); *MCI Sales & Serv. v. Hinton*, 272 S.W.3d 17, 25-28 (Tex. App. 2008).

preemption subsection is intended to result in uniformity of standards so that the public as well as industry will be guided by one set of criteria rather than by a multiplicity of diverse standards."). Instead of uniformity, some states—or different juries in the same state—could punish manufacturers for not having Type 1 belts, others could require only Type 2 belts, and yet others could require an even more aggressive active or passive restraint system not contemplated by the federal regulations. *See Kalo Brick*, 450 U.S. at 326 ("A system under which each State could, through its courts, impose . . . its own . . . requirements could hardly be more at odds with the uniformity contemplated by Congress."). The "unthinkable" situation feared by President Johnson ("50 standards for 50 different states") would become a reality. *See also Traffic Safety: Hearings on H.R. 13228 Before the House Comm. on Interstate and Foreign Commerce*, 89th Cong., 2d Sess., pt. 1, at 606 (1966) (statement of Rep. Hathaway) (explaining that uniform national standards were needed because multiple and inconsistent state standards would "creat[e] chaos in the automotive industry").

Second, adopting Petitioners' position would essentially do away with NHTSA's policy decisions underlying FMVSS 208 as a whole. Petitioners' position would allow each lay jury to determine the appropriate type of seatbelt necessary for each plaintiff and each accident regardless of the decades of research on which federal experts made policy decisions. Allowing common-law claims to set aside a determination of NHTSA's safety policies would unduly interfere with the regulatory means

authorized by Congress to achieve the Safety Act's goals. *See* 15 U.S.C. § 1392(f)(3) (providing the federal government with the authority to determine what is "reasonable, practicable and appropriate for the particular type of motor vehicle or item of motor vehicle equipment").

Third, allowing a jury to second-guess the wisdom of NHTSA's decisions or to re-write federal regulations in a way that appears to make sense in light of a single, perhaps unique, car accident would undermine the reliance that manufacturers should be permitted to place on these federal regulations. Such a result, as in this case, coming almost twenty years after Petitioners' minivan was placed on the market, would leave manufacturers forever uncertain as to which safety options they must choose in order to satisfy both the express federal regulations and the unpredictable state common law tort claims.

The common-law liability as claimed by Petitioners threatens to impose repeated, after-the-fact tort liability upon manufacturers for complying with a federal regulation. As so aptly stated in the Government's Brief, "NHTSA estimates that in 2008, approximately 1,040,438 vehicles in the United States were equipped with some Type 1 seatbelts, any one of which could potentially become the subject of a tort suit like this one." U.S. Br. 19. A common-law rule prohibiting the use of Type 1 belts in rear, inboard seats would punish automobile manufacturers in an unforeseeable, retroactive manner without fair notice and with unprecedented severity for exercising a right granted to them by

federal law.[12] This Court's interpretation of FMVSS 208 should be guided by avoiding a serious due process problem. When a federal regulation provides options for manufacturers on which they have relied, justice and fairness require that the manufacturers be entitled to rely upon that standard as establishing the duty of care.

CONCLUSION

The Court should uphold the judgment of the California Court of Appeal.

Respectfully submitted,

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[12] Neither Congress, nor a federal agency, nor a state can impose, without violating constitutional principles, such extreme liability retroactively. *See Eastern Enterprises v. Apfel*, 524 U.S. 498, 537 (1998) (concluding that it was unconstitutional and fundamentally unfair for employers "to bear a burden that is substantial in amount, based on employers' conduct far in the past"); *Arkema Inc. v. Environmental Protection Agency*, --- F.3d ---, 2010 WL 3363449, at *6-8 (D.C. Cir. Aug. 27, 2010) (concluding that when a retroactive rule narrows the scope of its interpretation, it changes the legal landscape in an impermissible way).

APPENDIX

APPENDIX A

PLAC CORPORATE MEMBERS

3M
A.O. Smith Corporation
ACCO Brands Corporation
Altec Industries
Altria Client Services Inc.
Anheuser-Busch Companies
Arai Helmet, Ltd.
Astec Industries
Bayer Corporation
Beretta U.S.A Corp.
BIC Corporation
Biro Manufacturing Company, Inc.
BMW of North America, LLC
Boeing Company
Bombardier Recreational Products
BP America Inc.
Bridgestone Americas Holding, Inc.
Brown-Forman Corporation
Caterpillar Inc.
Chrysler LLC
Continental Tire the Americas LLC
Crown Equipment Corporation
Daimler Trucks North America LLC
The Dow Chemical Company
E.I. duPont de Nemours and Company
Eli Lilly and Company
Emerson Electric Co.
Engineered Controls International, Inc.
Estee Lauder Companies
Exxon Mobil Corporation
Ford Motor Company
General Electric Company

General Motors Corporation
GlaxoSmithKline
The Goodyear Tire & Rubber Company
Great Dane Limited Partnership
Harley-Davidson Motor Company
Hawker Beechcraft Corporation
The Heil Company
Honda North America, Inc.
Hyundai Motor America
Illinois Tool Works, Inc.
International Truck and Engine Corporation
Isuzu Motors America, Inc.
Jaguar Land Rover North America, LLC
Jarden Corporation
Johnson & Johnson
Joy Global Inc., Joy Mining Machinery
Kawasaki Motors Corp., U.S.A.
Kia Motors America, Inc.
Koleraft Enterprises, Inc.
Kraft Foods North America, Inc.
Leviton Manufacturing Co., Inc.
Lincoln Electric Company
Magna International Inc.
Marucci Sports, L.L.C.
Mazak Corporation
Mazda (North America), Inc.
Medtronic, Inc.
Merck & Co., Inc.
Microsoft Corporation
Mitsubishi Motors North America, Inc.
Mueller Water Products
Nintendo of America, Inc.
Niro Inc.
Nissan North America, Inc.
Novartis Pharmaceuticals Corporation
PACCAR Inc.
Panasonic

Pfizer Inc.
Porsche Cars North America, Inc.
Purdue Pharma L.P.
Remington Arms Company, Inc.
RJ Reynolds Tobacco Company
Schindler Elevator Corporation
SCM Group USA Inc.
Segway Inc.
Shell Oil Company
The Sherwin-Williams Company
Smith & Nephew, Inc.
St. Jude Medical, Inc.
Stanley Black & Decker, Inc.
Subaru of America, Inc.
Synthes (U.S.A.)
Techtronic Industries North America, Inc.
Terex Corporation
TK Holdings Inc.
The Toro Company
Toshiba America Incorporated
Toyota Motor Sales, USA, Inc.
Vermeer Manufacturing Company
The Viking Corporation
Volkswagen of America, Inc.
Volvo Cars of North America, Inc.
Vulcan Materials Company
Watts Water Technologies, Inc.
Whirlpool Corporation
Yamaha Motor Corporation, U.S.A.
Yokohama Tire Corporation
Zimmer, Inc.